IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 25

ELMER W. HENDERSON,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN RAILROAD COMPANY,
Appellees.

On Appeal from the United States District Court for the District of Maryland.

BRIEF AMICUS CURIAE ON BEHALF OF THE CIVIL RIGHTS COMMITTEE OF THE NATIONAL BAR ASSOCIATION.

JOSEPH R. BOOKER, President, National Bar Association
RICHARD E. WESTBROOKS, Chairman, Civil Rights Committee, National Bar Association
GEORGE N. LEIGHTON
ZEDRICK T. BRADEN
LUCIA T. THOMAS
WILLIAM A. BOOKER
GEORGIA JONES ELLIS
EARL B. DICKERSON
JOSEPH E. CLAYTON, JR.
Members, Civil Rights Committee, National Bar Association

RICHARD E. WESTBROOKS
GEORGE N. LEIGHTON
Of Counsel

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BRIEF AMICUS CURIAE ON BEHALF OF THE CIVIL RIGHTS COMMITTEE OF THE NATIONAL BAR ASSOCIATION.

Now comes The National Bar Association, Inc., by Joseph R. Booker, president; Lucia T. Thomas, assistant secretary; Richard E. Westbrooks, chairman of the Civil Rights Committee of The National Bar Association; George N. Leighton; William A. Booker, Zedrick T. Braden, Georgia Jones Ellis, Earl B. Dickerson, and Joseph E. Clayton, Jr. as counsel for and members of said Civil Rights Committee of the aforesaid organization, for and on behalf of themselves and more than 3000 other lawyers, who are American CITIZENS of color, and having first obtained the consent of all parties of record to this cause, files this, its Brief *Amicus Curiae* as provided by the rules of this court as amended.

The National Bar Association has among its members, American Citizens of color who must utilize all

facilities of Railroads and Common carriers in the pursuit of their professions as members of the bar of all States and federal courts. Said railroads and the common carriers are subject to the jurisdiction of the Interstate Commerce Commission when that commission exercises the powers vested in it by the provisions of Title 49, U. S. C.

In our view the fundamental question presented on appeal by the appellant in this case affects the rights of every member of the National Bar Association. The interests of The National Bar Association and its members stem from the affect on the rights of these members of the rulings in the case at bar by the tribunals below. As American Citizens of color, the members of The National Bar Association share the conviction that the questions presented for review by this court will be more adequately considered if the brief *amicus curiae* be supported by argument and authorities which have been obtained by research of its Civil Rights Committee.

Further, the members of The National Bar Association respectfully call the attention of this Honorable Court to the fact that in addition to the rights of the members of the National Bar Association, and the appellant herein, the question presented on review touches the basic rights of more than 15,000,000 American citizens of color.

QUESTIONS PRESENTED.

We adopt the statements of the Questions Presented as they appear in the Briefs of the appellant and of the United States.

STATEMENT.

We adopt the Statement of the case as contained in the Briefs of the appellant and the United States Government.

SUMMARY OF ARGUMENT.

ARGUMENT.

POINT I.

The Dining Car Regulations adopted by the Southern Railway Company are void because their effect was to engraft on the Interstate Commerce Act a provision which the Congress of the United States has no power to enact or adopt.

As *amicus curiae,* we are constrained at the outset to emphasize the pervasive effect of the Dining Car Regulations of March 1, 1946, which were adopted by the Southern Railway. With commendable candor the railroad company admits that these regulations are designed to furnish the basis for a race segratory system by which American citizens who are passengers in interstate travel would be furnished accommodations in accordance with their race or color. The ultimate result of these regulations is racial segregation of all American citizens whenever they embark on interstate travel.

The particular statute that protects American citizens from discriminatory practices in interstate travel is paragraph 1 of sec. 3 of the Interstate Commerce Act. In *Mitchell* v. *United States,* 313 U. S., 80, this court construed this section ot the Interstate Commerce Act and held that it prohibited the denial of railroad facilities to an American citizen solely upon the fact that he is a Negro. In that case the passenger, purchased a round-trip ticket from Chicago, Illinois to Hot Springs, Arkansas. In Memphis, Tennessee the passenger tendered payment for a Pullman seat from Memphis to Hot Springs, Arkansas. The train conductor took up the Memphis-Hot

Springs, Arkansas portion of the ticket but refused to accept payment for the Pullman seat from Memphis and, in accordance with custom, compelled the colored passenger to move into the car provided for colored passengers. As in the case at bar, the accommodations which the railroad company in that case contended it had the right to give the passenger were allocated pursuant to a system by which passengers in interstate travel were sold accommodations in accordance with their race and color. Mr. Chief Justice Hughes, in condemning the treatment of this American citizen of color as being unjust said:

> "The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against State action by the 14th Amendment (*McCabe* v. *Atchinson, T. & S. F. Ry.*, 235 U. S., 151, 160-162; *Missouri ex rel Gaines* v. *Canada*, 305 U. S., 337, 344, 345) and in view of the nature of the right and of our Constitutional policies it can not be maintained that the discrimination as it was alleged was not essentially unjust."

Even a cursory reading of the Dining Car Regulations adopted by the Southern Railway Company (See appendix, brief for the United States) reveals without doubt that the appellee railroad company intends to treat all American citizens who come upon its trains in interstate commerce as was the appellant in the *Mitchell* case. Under these regulations an American citizen who tenders the proper fare for dining car service and who otherwise would be entitled to such service would be denied facilities because of his race or color. It is exactly this treatment that this court has said is "essentially unjust." *Mitchell* v. *United States, supra.*

This being so, we respectfully submit that the Dining Car Regulations adopted by the Southern Railroad ef-

fectuates a result which even the Congress of the United States is without power to create. We contend that if all the provisions of these Dining Car Regulations were carefully incorporated into a statute adopted by the Congress of the United States such a statute would contravene the limits of Congressional power defined in the 5th amendment to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States, in the third clause thereof, provides that no person shall "be deprived of life, liberty, or property without due process of law". This clause has been construed to prohibit the adoption by the Congress of the United States of any statute that will be discriminatory or arbitrary in character. Therefore, we contend, that if the Dining Car Regulations adopted by the Southern Railroad Company were enacted into law by Congress, such a statute would be so arbitrary and injurious in character as to violate the provisions of this clause of the Fifth Amendment to the Constitution of the United States. *U. S.* v. *Petrillo*, D. C. Ill., 1946, 68 F. Supp. 845.

It is the admitted objective of the appellee railroad company to provide a system under which American citizens in interstate travel would be given railroad services depending upon their race or color. Again we say, if these regulations were incorporated into law, such a law would have the same objectives. In other words, of American citizens similarly situated in interstate travel, one group, being Negroes because of their color, would be sold dining car services under one circumstance, and the other group, being white, also because of their color would be sold different accommodations. These regulations in effect deny to American citizens in interstate travel equality of dining car facilities because of their race. If these regulations were enacted into law

such a statute would result in railroad services being sold to one group of American citizens while it be denied to another. This result, The United States Court of Appeals for the District of Columbia said in *Pike* v. *Walker*, 121 F. 2d, 37 could not be done by the Congress of the United States in the exercise of its power over postal services. In that case the appellant appealed from an order dismissing his complaint to restrain and enjoin the Postmaster General of the United States from enforcing a fraud order issued against the appellant. The court said:

> "It may be safely stated, therefore, that no one can claim the right to use the mail for the transmission of matter which Congress has properly declared to be nonmailable, but we think it is equally clear, and is so stated in the *Coyne* case, that even Congress is without power to extend the benefits of the postal services to one class of persons and deny them to another of the same class."

The authority of the Interstate Commerce Commission and of the railroad to designate the treatment and the services to be accorded passengers in interstate travel has its sanction in the exclusive jurisdiction of Congress over the transmission of persons or property from state to state. *Railroad Co.* v. *Illinois*, 118 U. S. 557. But such power of designation and exclusion must be consistent with the rights of the people as reserved by the constitution. *Pike* v. *Walker*, *supra*.

We attach great interest to the fact that the exercise of this power affects more than the appellant in this case; the system instituted by the appellee railroad by its Dining Car Regulations will touch and affect the rights of every American citizen who needs the services sold by this railroad and others that follow its policies. The Dining Car Regulations, approved by the Interstate Commerce Com-

mission in its order below, become a part of the laws of the United States in the exercise of its power over interstate commerce. We submit, that this is an instance in which the exercise of power over an area in which Congress has exclusive jurisdiction has been effected inconsistent with the rights of the people.

By apt analogy we find support in the case of *Esquire* v. *Walker*, 151 F (2d) 49. There, the plaintiff filed an action to enjoin the enforcement of a decision of the Postmaster General revoking its second-class mailing privileges. The court in reversing an order denying the injunction used language which appears to us appropriate to this occasion:

> "But mail is not a special privilege. It is a highway over which all business must travel. The rates charged on this highway must not discriminate between competing businesses of the same kind. If the Interstate Commerce Commission were delegated the power to give lower rates to such manufacturers as in its judgment were contributing to the public good the exercise of that power would be clearly unconstitutional. • • •"

It is our contention that the order of the Interstate Commerce Commission in this case had the effect of an affirmative act of the Commission adopting the regulations. Cf. *Rochester Telephone* v. *United States, et al* 307 U. S. 125. And we submit that the act of the Commission is an act of the Congress of the United States since the Commission is the administrative agency to which regulation of interstate commerce has been delegated. In approving these Dining Car Regulations the Commission effectively abetted the creation of a discriminatory system by which railroad services are sold an American citizen in accordance with his race or color American citizens under such system will be denied full return in the moneys they pay for interstate travel service.

We note with approval that the Government of the United States in its Brief has cited numerous standard authorities dealing with the sociological effects of race discrimination and segregation. We adopt these authoritative citations and join in the request of the Government that this court reexamine and reconsider the doctrine of "separate but equal accommodations." We earnestly submit to this court that the oft cited principle which presumes public accommodations can be separate but equal is a theory devised in other days to avoid imagined unpleasantries in American race relations. Social studies by both foreign and American social scientists have established the fact that separate accommodations in public places are never equal. And we contend that equality in such instances is a physical impossibility. If the motive for urging separation of the races in public places is examined carefully, it will be seen that the opposite of equality is the objective sought by such practices. Equality that must be separate will destroy the inequality which is presumed by those who insist on separating the races in public accommodations. If such could be imagined, two Waldorf Astorias on opposite sides of the street would not only be physical impossibilities, but their existence would offend those who desire to exclude members of certain American minorities from the elegance now dispensed at the one we know exists. Segregation of the races in public places is one of the great evils which have been imposed on the American people from an era now outdistanced by our democratic instincts. Segregation, we submit, is by its very nature discrimination. For an agency of the American Government to adopt by approval a system of race segregation having these results in interstate travel is to deny to this appellant in particular, and to the American people in general, a basic right reserved in the people:

the right to equality of treatment by the Government, the right to be free from a governmental act that is arbitrary and injurious in character. *United States* v. *Petrillo, supra.*

II.

Under the exclusive power granted it by the Constitution of the United States, Congress has provided a broad and comprehensive plan for the regulation of interstate commerce by enacting the law known as the Interstate Commerce Act. This Act, as amended, precludes any state, public utility, person or body of persons from adding to, taking away from, limiting the scope of or restricting or interfering with the exercise of congressional power over interstate commerce.

By enacting the Interstate Commerce Act in 1887 the Congress of the United States declared the national policy with regard to treatment of American citizens in interstate travel or shipments. Title 49, U. S. C. We respectfully submit, therefore, that in addition to the reasons stated in the briefs for the appellant, and for the United States, we urge the following to demonstrate that the Dining Car Regulations of March 1, 1946 adopted by the Southern Railway Company are void:

1. Under the authority granted by the Constitution, the Congress of the United States in 1887 promulgated a full, comprehensive and uniform plan for the regulation of interstate commerce. The exclusive power of Congress over interstate commerce can be added, detracted or abrogated only by Congress.

2. Under the exclusive jurisdiction of Congress over interstate commerce, neither the states nor bodies of persons have power to impose restrictions upon the transmission of persons or property from state to state.

3. Under the authority delegated to a common carrier by the Interstate Commerce Act to adopt just and reasonable rules and regulations, the Southern Railway Company does not have power to adopt the Dining Car Regulations of March 1, 1946 because they contravene and violate the provisions of Section 3(1) of the Act.

This court has had occasion to rule on the principle we urge in the case at bar. In *Prigg* v. *Commonwealth of Pennsylvania*, 16 Pet. 535, 617; 10 L. Ed. 1060, 1090, speaking through Mr. Justice Story, this court struck down a Pennsylvania statute by which the state attempted to regulate fugitive slaves—a matter within the exclusive jurisdiction of Congress. The court said, 10 Pet. 535 at 617, 618:

> "In a general sense, this act may be truly said to cover the whole ground of the Constitution, both as to fugitives from justice, and fugitive slaves; that is, it covers both the subjects in its enactments; not because it exhausts the remedies which may be applied by Congress to enforce the rights, if the provisions of the act shall in practice be found not to attain the object of the Constitution; but because it points out fully all the modes of attaining those objects, which Congress in their discretion, have as yet deemed expedient or proper to meet the exigencies of the Constitution. If this be so, then it would seem, upon just principles of construction, that the legislation of Congress, if constitutional, must supersede all State legislation upon the same subject; and by necessary *implication prohibit* it. For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it (618) cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the

same purpose. In such case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as to the direct provisions made by it. This doctrine was fully recognized by this court in the case of *Houston* v. *Moore,* 5 Wheat. Rep. 1, 21, 22, (5 L. Ed. 19) where it was expressly held that where Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for State legislation to add to the provisions of Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it had not declared as by what it has expressed."

As was stated by Mr. Justice Story, when Congress enacts laws concerning a subject over which it has exclusive power, it was not intended by the Constitution that the states, corporate public utilities, persons or body of persons shall have power to interfere with Congressional jurisdiction. Governmental or quasi-governmental action in the same matter is void because it is presumed that if additional rules, regulations or laws materially affecting the subject were necessary, Congress would expressly delegate that power to subsidiary bodies to exercise. Therefore, when the Southern Railway Company and the Interstate Commerce Commission argue in the instant case that Congress has not expressly prohibited race segregation of American citizens in interstate travel, the obvious answer is because it has not expressly authorized such practice, any rule or regulation of a common carrier having such profound effect on the rights of American citizens is void because it invades important spheres of Congressional jurisdiction.

But we do not concede that Congress has failed to expressly prohibit race segregation in interstate travel.

We contend that the language of Section 3 (1) of the Act does condemn race segregation when it explicitly provides:

> "That it shall be unlawful for any common carrier subject to the Act to subject *any particular person* * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. 49 U. S. C. 3" *Mitchell* v. *United States,* 313 U. S. 80, at 93.

We do not believe that strained construction of this provision is necessary to show that the plain intent of Congress was to prevent just the form of discrimination that appellant complains of in the case at bar. Where the discrimination—the difference of treatment of persons similarly situated—is based on race distinctions, it is to be particularly considered repugnant to the mandate of Congress as expressed in Section 3 (1) of the Act. We respectfully submit that the power of Congress over interstate travel cannot be infringed upon by the rule or regulation of a common carrier in the manner attempted here.

The late and revered Mr. Justice Stone stated well the principle we think controls the instant case. He said in *United States* v. *Darby,* 312 U. S. 114 at 115:

> "The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution'. *Gibbons* v. *Ogden, Supra,* 196 (9 Wheat. 1, 196.) That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. *Kentuck Whip and Collar Co.* v. *Illinois Central R. Co., Supra.* (299 U. S. 334). Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the state for which they are destined it may

conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use." (Citing cases)

The exclusive power of Congress to regulate interstate commerce has never been doubted. Since the decision in *Gibbons* v. *Ogden,* 9 Wheat., 196, rendered by Chief Justice Marshall it has been the law, supported by a long unbroken line of decisions. When Congress has spoken by enacting a law governing subjects which admit of national uniform application, the states, for example, have no power to alter, amend, limit, restrict, extend, or in any manner place a burden upon interstate commerce by any law, rule or regulation. If Congress had desired to supplement the Interstate Commerce Act with any rule providing for race segregation of certain American citizens, it would no doubt have so declared. By its specific prohibition against discrimination, Congress declared that it was unlawful to subject "* * * any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 49 U.S.C. 3. We contend that any discrimination based upon an arbitrary racial classification of American citizens is undue or unreasonable prejudice or disadvantage in respect to those citizens.

Many decisions have been given by this Honorable court striking down laws, rules and regulations by whatever name they might have been called when the sum total amounted to discrimination in interstate commerce. Unjust discrimination by a common carrier has been defined "as a failure to treat all alike under substantially similar conditions". *Kentucky Traction and Terminal Co.* v. *Murray,* 195 S.W. 1119, 1120, 76 Ky. 59. We do not believe it can be seriously contended that it is not unjust discrimination to permit first class passengers of

the white race to enjoy dining car facilities without restrictions, and yet compel American citizens of color because of their race to be partitioned in little spaces separated from all other persons who had paid the same fare, and refuse them unrestricted service under similar conditions. By the Dining Car Regulations which the Commerce Commission has approved, all other persons, except the American citizens of color, are allowed the range of the dining car, allowed to select seats most comfortable to them. White passengers are not compelled to sit apart from other passengers, be shut off, cooped and enclosed with one table for service, or be refused service in the more spacious parts of the diner. It is admitted that American citizens of color were permitted the equal facilities of the dining cars without restrictions when they traveled as members of the armed forces and that they were not subjected to the humiliation of being segregated in a certain particular place and treated differently from all other American citizens similarly situated. (See: *Henderson* v. *Interstate Commerce Commission*, 80 Fed. Supp. 32.) Is it not time that America sustain the rights, privileges and immunities of its American citizens of color and that courts speak their denunciation of discrimination, segregation and denial of equal rights and privileges to this segment of the nation? Is it not time that we be consistent with our preachments to the world concerning equal treatment and opportunity to all mankind? Can America continue to be inconsistent when it preaches one doctrine to the world and practices another at home? We submit, it is time to be fair with ourselves and our fellow man and to make a realism "the brotherhood of man and the fatherhood of God."

"Discrimination" has again been held synonymous with "distinction". It is the antithesis of fairness. In

Atlantic Pipeline Co. v. *Brown County*, D. C. Tex. 12 Fed. Supp. 642, 647, it is stated:

> "Transportation in interstate commerce should be uniform and in accordance with contract made, fare charged and paid by each passenger."

As the white passenger pays a first class fare and is permitted the dining car facilities without restriction as to where he should sit then the American citizens of color who pay the same fare under the same contract should be given the same privilege. And if he be denied this, his rights are violated under the Interstate Commerce Act as an "unjust discrimination." He is treated differently from all other first class passengers. *Wimberly* v. *Georgia Southern and F. R. Co.*, 63 S. E. 2931; 5 Ga. App. 263. We do not believe that from the evidence in this case it can be honestly said there was no difference in treatment of the dining car facilities different from the treatment of all other persons. This violates the Interstate Commerce Act when the journey is in interstate commerce.

It is again stated that "unjust discrimination" results from different treatment of persons of the same class under similar conditions. *Lindenburg* v. *American Express Co.*, 106 So. E. 884; 88 W. Va. 439; *Elks Hotel Co.* v. *United Fuel Gas Co.*, 83 S. E. 922, 924; 73 W. Va. 200. We believe it will be conceded that when two persons pay the same fare they become members of the same class under similar conditions, and distinctions based solely on the color of one of the passengers result in unjust discrimination. Differences of treatment based solely upon race, color, or national origin are unjust, unreasonable and discriminatory.

It has been said that undue and unjust discrimination or unreasonable advantage or preference by a public service corporation under the Interstate Commerce Com-

mission Act *or at common law,* result from allowing to one person what is denied to another under exactly the same circumstances and conditions. 3 Moore on Carriers, 1705. To allow every other first class passenger traveling in interstate commerce the privilege of full dining car facilities and to deny the same privilege to an American citizen of color traveling under similar conditions cannot reasonably be deemed other than discriminatory. Segregation, solely on account of race, color or national origin in interstate commerce, is discrimination of the worst sort. These are the results where public utilities attempt to change the Interstate Commerce Act, without authority of law solely for the purpose of appeasing intolerance, hatred, prejudice, undemocratic and un-American customs.

In the case of the *State Freight Tax,* 15 Wall (82 U. S.) 232, this Court held, (P. 239)

> "The right of citizens of the United States to pass from point to point of the National territory, unrestricted by State regulation was emphatically asserted". See *Crandall* v. *the State of Nevada,* 6 Wall 25.

It was held that if taxing interstate commerce is not regulating it, it is not easy to imagine what would be and that a state had no power to tax or regulate interstate commerce. As a state has no power to tax or *regulate* interstate commerce then a Railroad Company has no such power because of powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people. Amendment X, United States Constitution. The power to regulate commerce with foreign nations, and among the several states, etc. was specifically delegated to Congress by the United States Constitution, Article I,

Section 8, because it is a subject matter which requires uniformity as said by Alexander Hamilton in the "Federalist" No. 7. In that historic essay one of the founders of our country depicted the injurious consequences of permitting the several states to regulate commerce.

The principle of uniformity in regulating interstate commerce is succinctly restated in *Howitt* v. *United States*, 328 U. S. 189, 192, in the following language, (p. 192):

> "It is well established that one of the primary aims of the Interstate Commerce Act and the amendments to it was to establish uniform treatment of users of transportation facilities. See *Mitchell* v. *United States*, 313 U. S. 80, 94, 95. The Act again and again expressly condemns *all kinds of discriminatory practice.*"

In *Morgan* v. *Virginia*, 328 U. S. 373, 382, this court held that race segregation rules of a bus company which were in conformity with the separate coach law of Virginia were void because they burdened interstate commerce. The court held the law as well as the rules void and of no effect. In the case at bar we find the same situation. Through the geographical area served by the Southern Railway Company there are states which have different laws defining the term Negro or Colored person. In *State* v. *Treadaway*, 126 La. 302, an Octoroon was held not to be a Negro. The court exhaustively considered the judicial and statutory definitions of Negroes, Colored Persons, Mulattoes, Octoroons, Quadroons and various other persons who were neither Colored, Negroes or White. Other classifications of persons are discussed in the opinion showing the necessity in this regard of a uniform act such as the Interstate Commerce Act to govern interstate commerce without any additions or alterations by common carriers.

There are many persons traveling within the jurisdiction of the United States with dark skins and of a mixture of darker races. Many would be considered Colored persons by the Agents of the Railroad company although they are natives of foreign lands. See Sex and Race by J. A. Rogers, Vol. II, p. 2, 3.:

"So mixed were the Portuguese that in 1492 there was already a Negro strain in its royal family. The same was true in less degree of the Spanish royal family. As for Italy, it had not only once been overrun by the Moors, but Negro slaves in great numbers had been brought in, principally between the thirteenth and fifteenth centuries by the Venetians. The Pisanos and Genoese also imported a considerable number from Nubia, Ethiopia, Sudan, and Morocco, and sold them to the noble families, who used them as servants, grooms, and favorites, and even amalgamated with them. So little was the prejudice against color in Europe that in the Sixteenth century the son of a Negro female slave, or servant, rose to be the head of the most distinguished royal family of the time.

This may be considered extraordinary now but it was not so then. The southern Europeans had been accustomed for centuries to having dark-skinned men among their rulers, in fact, whole series of them. As Roy Nash says, 'Many North Americans profess horror at the marriage of white and colored types, which is so common in South America.' Mark well, then, that the first contact of the Portuguese and Spaniards with a dark-skinned people was the contact of the conquered with the brown-skinned conquerors. And the darker man was the more cultured, the more learned, and the more artistic. He lived in the castles and towns. He was the rich man and the Portuguese became serfs upon his land. Under such conditions it would be deemed an honor for the white to mate or marry with the governing class, the brown man, instead of the reverse. Nor was it only the

> Portuguese peasantry whose blood mingled with the Moors. Alphonso VI, who united Castille and Leon and Galicia in 1073, to cite but one of many instances of marriages between Christian and Arab nobles, chose a Moorish princess the daughter of the Emir of Seville, to be the mother of his son, Sancho'."

The mixture and blending of Negro people with the inhabitants of the United States, Mexico, Central and South America, Europe and Asia is so evident that we feel it unnecessary to demonstrate its results.

We submit that the proposition of law urged in this brief concerning the comprehensiveness of the plan governing interstate commerce in the Interstate Commerce Act is supported in numerous cases and we feel it only necessary to cite a few; *Texas and Pacific Ry. Co.* v. *Interstate Commerce,* 162 U. S. 197; 16 S. 666; 40 L. Ed. 940. See (162 U. S. 197, 209). *Lehigh Valley R. Co.* v. *Public Service Commission,* 272 Fed. 758; Affd; 257 U. S. 591; *Hines et al* v. *Davidowitz* 312 U. S. 52, 62, 63, 70; *U. S.* v. *F. W. Darby Lumber Co. et al.,* 312 U. S. 100, 113, 114, in which last case this court states (p. 113):

> "The power to regulate commerce is the power to 'prescribe the rules by which commerce is governed'. *Gibbons* v. *Ogden,* 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect commerce but embraces those which prohibit it. (cases cited)."

In *Texas and Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 211, 212, the court at p. 211 states:

> "the scope or purpose of the Act is, as declared in its title, to regulate commerce. It would, therefore, in advance of an examination of the text of the Act, be reasonable to anticipate that the legislation would cover, or have regard to *the entire field of interstate*

commerce and that its scheme or regulation would not be restricted to a partial treatment of the subject".

What right has a public utility to make or attempt to adopt a regulation having such effect in interstate commerce? The regulations are unreasonable burdens on interstate commerce.

In the words of Cardinal Stritch, which we take liberty to quote:

> "The work you are engaged in has very close connection with religion and religion is interested in your work. *That law* describes justice and the right compensation for those who do honest work. You are engaged in building a democracy that is based upon justice and charity. The people of our democracy have given you power. That power has brought responsibilities. You are intrusted today in a large measure with the preservation of our free institutions. In our nation, freedom is under God's law. Your decisions will determine what the future of the United States is to be".

It is respectfully contended that the uniform law promulgated by Congress known as the Interstate Commerce Act, is full and complete. The Southern Railway has no power to add to it, detract from it, extend it, or amplify it.

III.

The regulations or rules of the Southern Railway Company, effective on and after March 1, 1946 are void because they are vague, indefinite and uncertain.

We have in mind the fact that this brief is addressed to the highest court in our land. This court is composed of lawyers selected not only for their natural judicial abilities but also for their demonstrably fair and impartial judgment. We invoke the principle often expressed by this Honorable Court, that it has been left to the

Courts to formulate the Rules interpreting the Commerce clause in its application. *Southern Pacific* v. *Arizona*, 325 U. S., 761. We see destructive consequences to the Commerce of the nation if the protective influences of the courts are withdrawn. We are confident, too, that members of this Honorable Court are fully aware of the contribution to the progress of this nation made by American Citizens of Color on our historic battlefields from Bunker Hill to Okinawa.

Considering the contribution to our national culture of American citizens of color, we believe that this Honorable Court will decide this case, fairly, and in accordance with the Constitution and laws of our country—laws under which all American citizens are alike. American citizens of color today, as this court will recognize, by their merits demonstrated to the world that they are entitled to the same treatment in public accommodations as other American citizens.

Fifteen million persons who form a part of the population of this great country are colored. This Honorable Court will take judicial notice of the great mass of persons of varying complexions who constitute the population of this nation. There is but one God; there is but one American Nation. When a railway company by regulation attempts to separate American citizens in accordance with their race or color it contravenes cardinal facts of human existence.

There are American citizens of this Commonwealth, for example, whose complexions range from the darkest black to the lightest hue. By what standard or test is the steward of the dining car or the conductor of the train to determine the race to which these American citizens belong? We know that there are persons commonly called white persons, who are darker in color than

many American Negroes. There are many white persons from the Balkan countries who are dark in color and complexion. Practically it is impossible for an agent of the railway company to do more than guess the ethnical group to which an American citizen belongs. Liberty and freedom are too dear to citizens of our country when their enjoyment must depend on such vague, uncertain and indefinite regulation as the Dining Car Regulations here attacked.

We call the attention of this Court to Chapter 3, Sec. 41 (Title 8 U.S.C., 5) designated as a part of the Civil Rights Act, enacted by Congress in 1866 and reenacted in 1870 which provides that all persons within the jurisdiction of the United States shall have the same rights in every state and territory to the *full and equal benefit of all laws* and proceedings for the security of person and property as is enjoyed by *white citizens*, etc. White citizens of America have never been segregated because of the color of their hair, the color of their eyes, the size of their ears, the length of their nose, the texture of their skin or other biological classification.

American citizens of color have availed themselves of the educational advantages afforded by the best schools of the nation. There are among them graduates of Harvard, Yale, Columbia University, the University of Chicago, Northwestern University, University of Pennsylvania, Dartmouth College, University of New York City, University of Michigan, University of Illinois, Howard University and all universities and schools to which they have been admitted. Many have been graduated with honors. Men and women, American citizens of color, have graduated from the law schools of these universities and have been taught the basic premises of the Constitution of the United States. They know that laws made pursuant

thereto are not idle words. They are enacted into law for the protection of the substantial aspects of life, for all persons within the jurisdiction of the United States.

We do not believe that this Honorable Court with its members of great learning will permit discrimination and segregation to continue against American citizens of color when Liberty and Freedom and the principles of Democracy are lived and enjoyed by the peoples of every other race.

It was stated in *Joseph* v. *Bidwell,* 28 La. An. 382, 383, that, "* * * the Constitution does not enumerate a mere abstraction but if guarantees substantial rights. To facilitate the enforcement of these rights the General Assembly has enacted laws. It is the duty of the courts when called upon, to enforce them."

We believe this to be a fair, frank and important statement of real Democracy. This court in numerous cases has condemned laws which are vague, indefinite and uncertain particularly when they affect the rights and liberties of American citizens. It is only necessary to call the attention of this Honorable Court to a few of the cases without extensive quotations therefrom. *U. S.* v. *Cohen Grocery Company,* 225 U. S. 81-89; 41 Sup. Ct., 298, 300, *U. S.* v. *Reese,* 92 U. S. 214-219-220, *U. S.* v. *Simmons,* 96 U. S. 360, *U. S.* v. *Capital Traction Co.,* 34 App. D. C. 592, *Connally v. General Construction Co.,* 269 U. S., 385, 46 Sup. Ct. 126-129 and numerous other cases well known to this Honorable Court.

Although the regulations or rules of The Southern Railway Company were not enacted by any legislative department of any government, they have been approved by the Interstate Commerce Commission, an agency of the Government. These regulations have further been approved by the United States District Court. They have

the effect of laws for which disobedience subjects the offenders to public prosecution. Such administrative and judicial sanction should not be allowed to stand.

IV.

The dining car regulations adopted by the Southern Railway Company are void because they violate Section 3 (1) of the Interstate Commerce Act.

In creating the Interstate Commerce Commission the Congress of the United States declared it the duty of every carrier subject to the act to "establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service * * *" Title 49 U.S.C., Sec. 1 (11). In the same section Congress declared that "every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared unlawful."

We have already pointed out that in Section 3(1) of the Interstate Commerce Act Congress declared it "unlawful for any common carrier subject to the Act to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." This court has construed this section as prohibiting all kinds of discriminatory practices. *Howitt* v. *United States*, 328 U. S. 189. And in *Mitchell* v. *United States*, 313 U. S. 80, this court held that the denial to a colored passenger of railway services because of the requirements of race separation was "unjust." We respectfully submit that the treatment of Appellant in the instant case, and the contemplated treatment of other American citizens who are subjected to the Dining Car Regulations here attacked are similarly unjust and unreasonable.

Thus, we contend, the Dining Car Regulations of March 1, 1946, adopted by the Southern Railway Company, are void because they violate an important provision of the Interstate Commerce Act.

The rule we invoke has been frequently applied. In *Robinson* v. *Southern Pacific Company*, 105 Cal. 526, 38 Pac. 722, 723, Mr. Chief Justice Beatty in giving the opinion of the court applied the doctrine we assert here and said:

> "It is said that the ticket is not the contract; that it is a mere token or voucher, and that it is the duty of the passenger to inform himself of the rules and regulations of the carrier. This is, perhaps, true to a certain extent. *But the passenger is not bound to take notice of any rule or regulation which contravenes the law of the land* • • •"

Mr. Chief Justice Ludeling, speaking for the court in *Decuir* v. *Benson*, 27 La. Ann. 1 at page 6, said:

> "That a common carrier may make reasonable rules and regulations for the government of passengers on board his boat or vessel is admitted, *but it cannot be pretended that a regulation which is founded on prejudice and which is in violation of law is reasonable.*"

Now turning to the Dining Car Regulations of the instant case we submit that they were conceived out of race prejudices. They are based on the rather erroneous assumption that every American citizen of color is so obnoxious a person that he must be relegated to a small portion of a railway diner. They also presuppose that every white American citizen desires to avoid association with colored passengers. The fact that often American citizens of all races mingle on business and professional levels is completely ignored in order that race prejudices shall predominate. Small categories of race classifications are made without standards or tests to guide those who must administer the rules. Admittedly, the employees of the appellee railway company are not qualified to apply tests of race classifications if such were included in the rules. Yet, by these Dining Car Regulations ordinary laymen

will be required to do that which has baffled anthropologists and social scientists: that is, the task of finding an accurate ethnic category for average American citizens on appearances alone. In this manner, one American citizen who to the railway employee appears to be a colored person will be given service behind a partitioned section of the car—the limited space area reserved for colored passengers; the other American citizen who to the railway employee appears to be a white person—and who paid the same first class fare—will be served in the spacious, well apportioned section of the diner. If this is not abhorrent discrimination we have great difficulty in finding a better description for such practices. And we earnestly submit to this court, that such practices have no place in interstate travel that is subject to the jurisdiction of the federal government, a government that has been modeled under an organic document that has inspired men the world over. We ask this court, therefore, to declare these regulations void, and to reverse the judgments below.

CONCLUSION.

The briefs of the appellant and of the United States of America have ably discussed the cases of *Plessy* v. *Ferguson*, 163 U. S. 537, 538, 540, 16 Ct. 1138, 41 L. Ed. 256 (1896), and *Chiles* v. *Chesapeake & Ohio Railway Company*, 218 U. S. 71, 72, 74 (1910), 54 L. Ed. 936, 30 S. Ct. 667, in refutation of the claim by the Southern Railway Company, and the Interstate Commerce Commission that these cases were authority for the actions of the Southern Railway Company and the Interstate Commerce Commission in the promulgation of such un-American rules, which discriminate and segregate American citizens of color in interstate commerce, solely by

reason of their color or race. We believe it is necessary to quote from the opinion of these cases to show that the issues involved do not concern interstate commerce, and therefore are not authorities in the case at bar.

In *Plessy* v. *Ferguson*, 163 U. S. 537, 538, this honorable court states the issue involved, and merely reading the case demonstrates its inapplicability. On page 538 this court states:

> "That on June 7, 1892, he engaged and paid for a first class passage on the East Louisiana Railway from New Orleans to Covington in the same State, etc."

This clearly shows that any question raised or decided must necessarily relate to *intrastate* transportation, and not *interstate*.

Unless we set aside, annul and disregard all fundamental principles of American procedure, it is perfectly apparent that any attempt to discuss interstate commerce where the sole issue involved is intrastate commerce, such discussion is *obiter dicta*.

In *Chiles* v. *Chesapeake & Ohio Railway*, 218 U. S. 71, 72, 74, a cursory reading of this opinion will also clearly show that the issue involved does not deal with *interstate commerce*, but was solely limited to *interstate commerce*, such was the finding of the Court of Appeals, the court of last resort of the State of Kentucky, and of this Honorable court.

The fact that the question of interstate commerce was not considered by either of the courts is well stated on page 74 of the opinion of this court:

> "There is a statute of Kentucky which requires Railroad Companies to furnish separate coaches for the white and colored passengers, *but the Court of Appeals of the state put the statute out of considera-*

tion, declaring that it had no application to INTERSTATE TRAINS, and defendant in error does not rest its defense upon that statute, but upon its rules and regulations."

We submit that this quotation from the opinion of this honorable court is conclusive, that no question of *interstate* commerce was involved, and therefore this case is no authority for any issue involving *interstate* commerce.

Equality of all American citizens without regard to race, color or national origin is proclaimed to the world by this, our country. Is it to be made real by the decision of this court, or is it to be used as a mockery against the administrators of our government? The doctrine of equal rights and equal opportunities are daily taught in the schools, homes, colleges and universities of the United States, and these fundamental principles of American Government are heralded upon the floors of Congress and constantly enunciated by the Chief Executive of this nation.

We do not condone the un-American activity evidenced in certain parts of our native land, and insist that the principles enunciated by the Constitution and laws made pursuant thereto be upheld.

The issues involved in this case are limited to *interstate commerce,* over which Congress has exclusive jurisdiction, a principle so well settled as to be axiomatic. When we consider the indisputable fact, judicially known, that in interstate commerce, chickens, cows, pigs, horses and animals of every color are transported from state to state without being discriminated against by segregation, solely on account of their color, it is indeed startling that in this day and age human beings who are American Citizens of color are the only persons segregated and discriminated against in *interstate commerce.*

We respectfully submit there is no justification for such undue and unfair discrimination by segregation as appears in this case. We expect this honorable court to perform its duties, as learned men of law and whose hearts are filled with the Christian spirit of justice and equal rights in its fullest sense, to American Citizens regardless of race, color or national origin which are God given qualities.

Respectfully submitted,

JOSEPH R. BOOKER, President, National Bar Association

RICHARD E. WESTBROOKS, Chairman, Civil Rights Committee, National Bar Association

GEORGE N. LEIGHTON

ZEDRICK T. BRADEN

LUCY T. THOMAS

WILLIAM A. BOOKER

GEORGIA JONES ELLIS

EARL B. DICKERSON,

JOSEPH E. CLAYTON, JR.

Counsel for and Mmembers of the Civil Rights Committee, National Bar Association

RICHARD E. WESTBROOKS
GEORGE N. LEIGHTON,
Of Counsel

Dated this the 24th day of January, A. D. 1950.

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Member of the Supreme Court of the United States.